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APPENDIX "A"
ORDER DATED SEPTEMBER 23, 1975

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of September, one thousand nine hundred and seventy-five

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UNITED STATES ex rel. ALPHONSE INDELICATO,

Petitioner,

-v.-

NEW YORK STATE BOARD OF PAROLE

Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner by notice of motion dated August 25, 1975 for a certificate of probable cause be and it hereby is denied.

It is further ordered that

s/Leonard P. Moore
LEONARD P. MOORE

s/Wilfred Feinberg
WILFRED FEINBERG

s/James L. Oakes
James L. Oakes

Circuit Judges

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APPENDIX B

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of December, one thousand nine hundred and seventy-five

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United States ex rel. Alphonse Indelicato,
Petitioner,

v.

New York State Board of Parole,
Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner by notice of motion dated November 24, 1975 to reconsider the order of this court dated September 23, 1975 denying a certificate of probable cause and to grant a certificate of probable cause be and it hereby is denied.

s/ Leonard P. Moore
Leonard P. Moore

s/ Wilfred Feinberg
Wilfred Feinberg

s/ James L. Oakes
James L. Oakes

Circuit Judges

APPENDIX "C"

OPINION

(SAME TITLE)

GRIESA, J.

This is a petition for habeas corpus under 28 U.S.C. §2254. Petitioner Alphonse Indelicato seeks release from the supervision of the New York State Parole Board and a hearing on the facts alleged in his petition. The petition is denied.

Petitioner was tried twice for murder in the first degree and attempt to commit murder in the first degree. The jury was unable to agree on a verdict during the first trial. At a second trial, petitioner was convicted on June 30, 1954 of murder in the second degree and attempt to commit murder in the first degree. He was sentenced to twenty years to life on the murder conviction and to a concurrent 12-1/2 to 25 year term on the attempted murder conviction.

The conviction was affirmed by the appellate courts of New York State, and the United States Supreme Court denied certiorari on October 14, 1963. *Indelicato v. State of New York*, 375 U.S. 844 (1963).

An application for post-conviction relief based on an allegation that the prosecutor withheld evidence from petitioner and knowingly condoned perjury by the State's chief witness was denied on April 9, 1974 by Justice Martinis of the Supreme Court, New York County, after a full evidentiary hearing. Leave to appeal that decision to the Appellate Division, First Department was denied on May 28, 1974. Having exhausted his state remedies,

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petitioner seeks relief in this court.

In essence, petitioner's application for habeas corpus restates the claims made in the state *coram nobis* proceeding.

The basic facts related to the claim are as follows. The principal witness against petitioner at the murder trial was Rocco Tisi, an eye-witness. Tisi testified for the prosecution at petitioner's first trial in October, 1953. That trial ended with a hung jury and petitioner was retried in the spring of 1954.

Prior to the commencement of the second trial, Tisi, then an owner of a bar and grill in New York County, was notified by the State Liquor Authority [SLA] that his liquor license would not be renewed because on his original application, Tisi had not disclosed that he had twice been arrested for crimes that the SLA required to be reported.

Tisi was under police protection at the time and he brought the notice to the attention of Assistant District Attorney Vincent Dermody, who was prosecuting petitioner's case. Through Dermody's intercession, the SLA agreed to stay the cancellation of Tisi's liquor license. This agreement was evidenced by a stipulation signed by Tisi and a representative of the SLA, dated February 26, 1954. The stipulation provided that the SLA would renew Tisi's license because it had been informed by the District Attorney's office that the interests of justice called for a deferment of all action by the SLA to a later date. This stipulation had been obtained by petitioner's trial counsel when he subpoenaed the SLA file on the matter, but was never introduced into evidence at petitioner's trial on the ground that it contained information on Tisi's prior criminal record. Apparently, petitioner's trial counsel did not attempt to have the stipulation admitted by redacting the portion related to Tisi's criminal record.

At the trial, Tisi was questioned as to whether Dermody intervened on his behalf with the SLA. Tisi answered that Dermody "must have" interceded, but did not admit knowing that he did.

When the respondent in the *coram nobis* proceeding subpoenaed the SLA file on the matter, it was found to contain an "Internal Memorandum" which contained additional details of Dermody's intervention with the SLA.

Petitioner claims here, as he did in the state court, that without access to this internal memorandum, which he claims he should have obtained in 1954 when he subpoenaed the SLA file, he was deprived of effective means of cross-examining the prosecution's principal witness and was thus denied his right to fully confront a witness, in violation of the Sixth and Fourteenth Amendments.

In addition, petitioner claims that Dermody allegedly condoned Tisi's perjury on the witness stand, and that the prosecutor commented unfairly on that testimony in his summation to the jury.

28 U.S.C. §2254 (d) provides that in a federal habeas corpus proceeding, the determination of fact by the State court "shall be presumed to be correct" unless the factual determination is not fairly supported by the record. After a full evidentiary hearing on the application for *coram nobis* relief at which both Tisi and Dermody testified, Justice Martinis found that there was no showing of perjury by Tisi at the trial. In regard to the claim of non-disclosure of the SLA internal memorandum, Justice Martinis properly concluded that "this was a miniscule issue of recent occurrence at the time the trial took place . . . The issue of the prosecutor's intervention was already known to the defense counsel and was put before the court and jury." It had no bearing on what the witness saw on the night of the murder.

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The findings made by Justice Martinis are amply supported by the record. It is unnecessary to hold a hearing in this court, since on the facts found by Justice Martinis it is clear that petitioner has not suffered the claimed deprivation of his constitutional rights.

In regard to petitioner's claim that the prosecutor unfairly commented on Tisi's allegedly perjured testimony in his summation to the jury, I agree with respondent that the language was proper and that the prosecutor was entitled to argue that the jury should disregard the threatened loss of the liquor license by Tisi in assessing his credibility. Defense counsel had ample opportunity to try to convince the jury otherwise in his summation.

Coming finally to petitioner's claim that he was denied his constitutional right to fully confront a witness by virtue of the fact that he did not possess the SLA internal memorandum, I find this claim also without merit. The fact of Dermody's intervention with the SLA on Tisi's behalf was well known to petitioner's trial counsel who had the stipulation in his possession. As Justice Martinis pointed out, the stipulation, properly redacted, could have been offered into evidence at the trial. It can only be presumed that it was a question of trial strategy that prevented petitioner's counsel from doing so.

For the foregoing reasons, the petition for habeas corpus is denied. The alternative request for a certificate of probable cause is similarly denied.

So ordered.

Dated: New York, New York
July 28, 1975

s/Thomas P. Griesa
THOMAS P. GRIESA
U.S.D.J.

APPENDIX D

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 36

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ALPHONSE INDELICATO,

Defendant.

MARTINIS, J.:

A hearing was held pursuant to a motion for post-judgment relief, which, in effect, attacks the fairness of the trial of the movant by our predecessor court and raises constitutional issues hitherto not raised in the nineteen or more years that the judgment has stood.

The defendant was tried twice for murder in the first degree and attempt to commit murder in the first degree. The first trial was terminated by the failure of the jury to agree upon a verdict, and upon a second trial, held on June 30, 1954, the defendant was convicted for the crimes of murder in the second degree and an attempt to commit murder in the first degree.

The defendant was sentenced to imprisonment for a term of twenty years to life and, on the second count, to a term of twelve and one half to twenty-five years. The defendant was well represented at that trial by able counsel, and the court was presided over by the Hon. Harold A. Stevens. On April 13, 1961, this conviction was affirmed by the Appellate

Division and subsequently on December 6, 1962, by the Court of Appeals, which also reviewed and affirmed a denial without a hearing of an application by the defendant for a writ of error coram nobis. Certiorari to the United States Supreme Court was denied on October 14, 1963. Thus the judgments heretofore have been sustained upon appeal and reviewed by both State and Federal Courts. The defendant is presently on parole.

The issue at the trial of the defendant was whether he killed another person and attempted to kill Rocco Tisi.

Rocco Tisi was a complainant in the case. He was also the only eyewitness to the homicide of another person, as well as to his own attempted assassination. He testified at both the first and second trials of the defendant against the defendant and later at two trials of a codefendant who was convicted in the first trial for the same crimes and acquitted in the second after the judgment in the first trial had been reversed.

Prior to the commencement of the second trial of the movant, the State Liquor Authority (SLA) served notice on Rocco Tisi that it would not continue the liquor license under which he was operating his bar on the lower East Side in New York. Tisi was under police protection at the time, and he brought the notice to the prosecutor's attention.

Subsequently, through the intercession of the prosecutor, a State Liquor Authority Commissioner authorized the continuance of the state liquor license by means of a stipulation extending it provisionally. It appears that Tisi continued to operate his business for some years after, until it closed for other reasons.

It is the alleged suppression of this intercession by the prosecutor through the eyewitness Tisi that has been made

the focal point upon which it is claimed the judgment must be vacated.

The principal witness at the hearing for the movant was Rocco Tisi, who testified that he had never testified to the ultimate truth (S.M. p. 58), which in substance related to the District Attorney's effort to intercede on his behalf with the S.L.A. His testimony at the hearing was to some degree a recantation of part of his cross-examination at the trial. At that time, in 1954, he testified substantially that before the second trial of the defendant he received the notice; that he talked to the prosecutor, who told him he would look into it and Tisi assumed that he did, but did not know what the prosecutor had done about having his license continued. At the hearing he testified that he did know that it was through the prosecutor's efforts that his license was not revoked and that he didn't say it at the trial on cross-examination because the prosecutor had told it to him in confidence. It further appears that no effort was made by the prosecutor himself to fill in the information on the record of his active intervention on Tisi's behalf.

The contention by the movant that the prosecutor endorsed a lie on the record and deliberately misled the court and jury as to Tisi's personal knowledge of his own active intervention procuring the continuance of the license cannot be sustained unless the court finds from the evidence here adduced that the prosecutor knew Tisi was not telling the truth.

The determination of this issue devolves upon the resolution of Tisi's veracity at the time of his cross-examination at the trial. If the movant fails to show by a preponderance of the evidence that the witness was privy to what the prosecutor in fact did, that contention must fall. Tisi's testimony here, as it was stated above, amounts to

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some degree of recantation of his testimony at trial with regard to an independent issue which was not relevant to the main issue at trial.

". . . the prevailing judicial attitude is that recantation should be 'looked on with the utmost suspicion.' United States v. Troche, 213 F 2d 401, 403; United States v. Batsell, 403 F. 2d 395, 403 (8th Cir. 1968), *cert. denied*, 393 U.S. 1094; United States v. Lewis, 338 F. 2d 137 (6th Cir. 1964), cert. denied, 380 U.S. 978." (United States v. Persico No. 60-CR-147, March 15, 1972, where movant very similarly sought the vacatur of the judgment on recantation and suppression of a main witness).

Of course, it would be manifestly unfair to exclusively adopt this criterion in determining the issues that have been laid before the court at the hearing, for on this basis alone there would be no need for a hearing. In making its finding and conclusions, the court has very carefully observed the witness and scrutinized the testimony on the record. The response to questions by both sides and his often volunteered remarks at the hearing reveal a pathetic figure of a man whose life was literally broken up by the incident of being called as a state's witness in four cases by the same prosecutor, in being kept in protective custody for a period of ten years, and recently by being again called by the same prosecutor's office in regard to some other information unrelated to this hearing. For his misfortune he blames the state and its prosecutor. He is not a well man, suffering from various medical disorders, and his sensitivity threshold appears to be very weak. His inclination to please both sides, while favoring the defendant, is obvious; and his inability to recall certain events further weakens his credibility. The totality of all these circumstances and facts adduced from his testimony puts into question his motivation and therefore his veracity.

It is the considered opinion of the court that the movant has failed to sustain his burden of proof that the witness was false in some parts of the testimony, as alleged, at the second trial of Indelicato. A necessary corollary of this is that in like manner the movant has not sustained his burden that the prosecutor endorsed false testimony.

The further contention of the movant in attacking the constitutionality of the trial and the judgment, that the prosecutor did not volunteer fuller disclosure regarding the liquor license than that given by the witness, is another issue that has been raised and should be determined. In order to consider this question, regard should be had to the fact that this was a miniscule issue of recent occurrance at the time the trial took place. It had occurred more than two years after the indictment and after the termination of the first trial. The crucial issue was what the witness saw on the night of the homicide and the attempted killing. Relative to this, no claim has or had been made that Tisi's testimony was in anywise different from the testimony he had given at the first trial or before the grand jury. The issue of the prosecutor's intervention was already known to the defense counsel and was put before the court and jury. Notwithstanding the contentions of frustrations in obtaining complete disclosure from the witness, defense counsel had available to him the S.L.A. stipulation, which, properly redacted, could have been offered into evidence; and moreover, under the exigent and special circumstances of the case, could have called the prosecutor as a witness, or, in lieu of the latter, demanded stipulations as to the facts. So that at this point it became a matter of trial strategy which the experienced counsel must have rejected for whatever reason known to him.

The "suppression" relied upon by counsel is a misnomer in this case, for the word as used in criminal law signifies a

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concealment of knowledge which is unavailable to the defendant or his counsel. General principles governing the production of evidence in the course of a trial seeking the final determination of issues require the adverse party to seek to elicit facts from the evidence and the witnesses he has available. The exploration and resolution of issues alleged to be important by the adverse party having knowledge of them is the function of the trial. The failure to utilize available material and testimony at a trial cannot later be converted into a claim of suppression. It is when concealment is discovered after the trial of the case and it is found that the disclosure of it might have materially affected the outcome of the trial that the court will vacate its judgment. But the failure to properly develop, adduce and elicit evidences from sources then available does not mandate such a vacatur.

Reiterating the well-known principle in United States v. Sobell, 142 F. Supp. 529, affd. 244 F. 2d 520; certiorari denied 355 U.S. 873; rehearing denied 355 U.S. 920, the court said:

> " '[It is] of the essence of orderly trials that the right to counsel accorded to defendants by the constitution be not regarded as the argument here would seem to regard it as a mere one way street such that if the strategy and tactics of his trial counsel, in determining not to raise constitutional questions prove unsuccessful, defendant . . . may many years later set it aside in order that, on another trial with another counsel, another course raising these questions may be taken and so on ad infinitum'. Bowen v. United States, 5 Cir., 1951, 192 F. 2d 515, 517, certiorari denied 1952, 343 U.S. 943, 72 S.Ct. 1036, 96 L.Ed. 1348.

". . . Time after time the courts have held that whenever knowledge was in the possession of defense counsel during trial of facts which either established the impropriety of certain evidence, or cast doubts upon its admissibiity, they are barred from raising this question on a motion to vacate the judgment.

" 'Where parties, even in a criminal case, knowingly and deliberately adopt a course of procedure which at the time appears to be to their best interest, they cannot be permitted at a later time, after a decision has been rendered adverse to them to obtain a retrial according to procedure which they have voluntarily discarded and waived.' Carruthers v. Reed, 8 Cir. 102 F. 2d 933, 938, certiorari denied 1939 307 U.S. 643."

Having failed to sustain his burden of proof of the knowing use of perjured testimony, mere nondisclosure under the circumstances stated does not support the contention of prosecutorial misconduct that would make applicable the cases cited by movant's counsel in his brief.

For the reasons stated above, the motion is in all respects denied.

Dated: April 9th, 1974

s/ J. M.
J.

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